PCG 2016/5 - Income tax - arm's length terms for Limited Recourse Borrowing Arrangements established by self-managed superannuation funds

Practical Compliance Guideline

PCG 2016/5

Income tax – arm's length terms for Limited Recourse Borrowing Arrangements established by self-managed superannuation funds

Relying on this Guideline

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this guideline in good faith, the Commissioner will administer the law in accordance with this approach.

Table of Contents **Paragraph**

What this Guideline is about

1. When a Self-Managed Superannuation Fund (SMSF) acquires an asset under a Limited Recourse Borrowing Arrangement (LRBA), the non-arm's length income (NALI) provisions in section 295-550 of the *Income Tax Assessment Act 1997* (ITAA 1997) may

apply to ordinary or statutory income generated from the asset if the terms of the LRBA are not consistent with an arm's length dealing.

2. This Guideline sets out the 'Safe Harbour' terms on which SMSF trustees may structure their LRBAs consistent with an arm's length dealing. That is, for income tax compliance purposes, the Commissioner accepts that an LRBA structured in accordance with this Guideline is consistent with an arm's length dealing and that the NALI provisions do not apply purely because of the terms of the borrowing arrangement.

3. As noted under the *Date of effect,* this Guideline applies where the requirements of section 67A (or former subsection 67(4A) if applicable) of the *Superannuation Industry (Supervision) Act 1993* (SISA) are met at all times, and is not intended to override or replace those or any other SISA requirements that apply.

4. If SMSF trustees have entered into an arrangement which does not meet all of the 'Safe Harbour' terms set out in this Guideline, whilst the trustees are unable to be assured that the Commissioner will accept the arrangement to be consistent with an arm's length dealing, it does not mean that the arrangement is deemed not to be on arm's length terms. It merely means that there is no certainty provided under this Guideline. The trustees will need to be able to otherwise demonstrate that the arrangement was entered into and maintained on terms consistent with an arm's length dealing. One example of how a trustee may demonstrate this is by maintaining evidence that shows their particular arrangement is established and maintained on terms that replicate the terms of a commercial loan that is available in the same circumstances.

Date of effect

5. This Guideline applies to SMSF trustees who have established LRBAs that meet the requirements of section 67A (or former subsection 67(4A) if applicable) of the SISA, regardless of whether the arrangement commenced before or after the date of publication of this Guideline.

Safe Harbour 1: The asset acquired is real property

6. Safe Harbour 1 applies when an SMSF uses an LRBA to acquire real property or to refinance a borrowing used to acquire real property, whether that property is residential or commercial premises (including property used for primary production activities).

7. The ATO accepts that an LRBA used to acquire real property, or to refinance a borrowing used to acquire real property, is consistent with an arm's length dealing if the terms of the borrowing are established and maintained throughout the LRBA as set out below.

Interest Rate	Reserve Bank of Australia Indicator Lending Rates for banks providing standard variable housing loans for investors. Applicable rates: – For the 2015-16 year, the rate is 5.75%[1] – For the 2016-17 and later years, the rate published for May (the rate for the month of May immediately prior to the start of the relevant financial year)

[1] Interest is to be calculated monthly on a compounding basis.

Fixed / variable	Interest rate may be variable or fixed – Variable – uses the applicable rate (as set out above) for each year of the LBRA – Fixed – trustees may choose to fix the rate at the commencement of the arrangement for a specified period, up to a maximum of 5 years. The fixed rate is the rate published for May (the rate for the May before the relevant financial year). The 2015-16 rate of 5.75% may be used for LRBAs in existence on publication of these guidelines, if the total period for which the interest rate is fixed does not exceed 5 years (see 'Term of the loan' below)
Term of the loan	Variable interest rate loan (original) – 15 year maximum loan term (for both residential and commercial) Variable interest rate loan (re-financing) – maximum loan term is 15 years less the duration(s) of any previous loan(s) relating to the asset (for both residential and commercial) Fixed interest rate loan – a new LRBA commencing after publication of these guidelines may involve a loan with a fixed interest rate set at the beginning of the arrangement. The rate may be fixed for a maximum period of 5 years and must convert to a variable interest rate loan at the end of the nominated period. The total loan term cannot exceed 15 years. For an LRBA in existence on publication of these guidelines, the trustees may adopt the rate of 5.75% as their fixed rate, provided that the total fixed-rate period does not exceed 5 years. The interest rate must convert to a variable interest rate loan at the end of the nominated period. The total loan cannot exceed 15 years.
Loan to Market Value Ratio (LVR)	Maximum 70% LVR for both commercial and residential property If more than one loan is taken out to acquire (or refinance) the asset, the total amount of all those loans must not exceed 70% LVR. The market value of the asset is to be established when the loan (original or re-financing) is entered into. For an LRBA in existence on publication of these guidelines, the trustees may use the market value of the asset at 1 July 2015.
Security	A registered mortgage over the property is required
Personal guarantee	Not required
Nature & frequency of repayments	Each repayment is of both principal and interest Repayments are monthly
Loan agreement	A written and executed loan agreement is required

Safe Harbour 2: The asset acquired is a collection of stock exchange listed shares or units

8. Safe Harbour 2 applies when an SMSF uses an LRBA to acquire a collection of shares in a stock exchange listed company or to acquire units in a stock exchange listed unit trust.

Safe Harbour 2 also applies when an SMSF uses an LRBA to refinance a borrowing used to acquire such a collection.

9. The ATO accepts that an LRBA used to acquire or to refinance a borrowing used to acquire stock exchange listed shares or stock exchange listed units in a unit trust is consistent with an arm's length dealing if the terms of the borrowing are established and maintained throughout the LRBA, as set out below.

Interest Rate	Reserve Bank of Australia Indicator Lending Rates for banks providing standard variable housing loans for investors plus 2%. Applicable rates: – For the 2015-16 year, the interest rate is 5.75% + 2% = 7.75%[2] – For the 2016-17 and later years, the rate published for May plus 2% (the rate for the month of May immediately before the start of the relevant financial year)
Fixed / variable	Interest rate may be variable or fixed – Variable – uses the applicable rate (as set out above) for each year of the LBRA – Fixed – trustees may choose to fix the rate at the commencement of the arrangement for a specified period, up to a maximum of 3 years (see 'Term of the loan' below). The fixed rate is the rate for May plus 2% (the rate for the May before the relevant financial year) The 2015-16 rate of 7.75% may be used for LRBAs in existence on publication of these guidelines, if the total period for which the interest rate is fixed does not exceed 3 years (see 'Term of the loan' below)
Term of loan	Variable interest rate loan (original) – 7 year maximum loan term Variable interest rate loan (re-financing) – maximum loan term is 7 years less the duration(s) of any previous loan(s) relating to the collection of assets Fixed interest rate loan – a new LRBA commencing after publication of these guidelines may involve a loan that has a fixed interest rate set at the beginning of the arrangement. The rate may be fixed up to for a maximum of 3 years, and must convert to a variable interest rate loan at the end of the nominated period. The total loan term cannot exceed 7 years. – For an LRBA in existence on publication of these guidelines, the trustees may adopt the rate of 7.75% as their fixed rate, provided that the total period of the fixed rate does not exceed 3 years. The interest rate must convert to a variable interest rate loan at the end of the nominated period. The total loan cannot exceed 7 years.

[2] Interest is to be calculated monthly on a compounding basis.

LVR	Maximum 50% LVR If more than one loan is taken out to acquire (or refinance) the collection of assets, the total amount of all those loans must not exceed 50% LVR. The market value of the collection of assets is to be established when the loan (original or re-financing) is entered into. For an LRBA in existence on publication of these guidelines, the trustees may use the market value of the asset at 1 July 2015.
Security	A registered charge/mortgage or similar security (that provides security for loans for such assets)
Personal guarantee	Not required
Nature & frequency of repayments	Each repayment is of both principal and interest Repayments are monthly
Loan agreement	A written and executed loan agreement is required

More information

10. For more information see:

- Taxation Determination TD 2016/16 *Income tax: will the ordinary or statutory income of a self-managed superannuation fund be non-arm's length income under subsection 295-550(1) of the Income Tax Assessment Act 1997 (ITAA 1997) when the parties to a scheme have entered into a limited recourse borrowing arrangement on terms which are not at arm's length?*
- Self Managed Superannuation Funds Ruling SMSFR 2012/1 *Self Managed Superannuation Funds: limited recourse borrowing arrangements - application of key concepts*
- Limited Recourse borrowing arrangements – questions and answers
- Legislative Determinations SPR 2014/1 *Self Managed Superannuation Funds (Limited Recourse Borrowing Arrangements - In-house Asset Exclusion) Determination 2014*
- Section 67A and section 67B of the SISA

Background and Additional Information

11. ATO interpretative decisions, ATO ID 2015/27 and ATO ID 2015/28, have been withdrawn. The Commissioner has issued Taxation Determination TD 2016/16 on 28 September 2016.

12. Parties, including an SMSF, who enter into an LRBA on terms not consistent with an arm's length dealing, should consider the further matters addressed in TD 2016/16.

13. If we are asked to state formally (for example, in a private ruling or in litigation) whether a particular SMSF's LRBA gives rise to NALI for any income year, our approach will be consistent with Taxation Determination TD 2016/16.

ATO's compliance approach for LRBAs established before 30 June 2016

14. The ATO recognises the effects of the NALI provisions, and the importance of preserving assets held by an SMSF. Given this, we will not select an SMSF for an income tax review for the 2014-15 year or earlier years purely because the SMSF has entered into an LRBA. However, this is conditional on the SMSF trustee ensuring that any LRBA that their fund has is on terms consistent with an arm's length dealing by 31 January 2017 or, alternatively, is brought to an end by 31 January 2017.

15. In addition, payments of principal and interest must be made under LRBA terms consistent with an arm's length dealing. SMSF trustees who are concerned about their ability to make the required payments on commercial terms before 31 January 2017 can contact the ATO to discuss their particular circumstances. In the first instance, taxpayers can write to us, outlining their particular circumstances, at the following address:

PO Box 3100
Penrith NSW 2740

16. In other words, SMSF trustees have an opportunity to review the terms of their funds' LRBAs before 31 January 2017. The terms of their LRBAs will not be subject to any further compliance action for the 2014-15 income years (or before) if, by 31 January 2017:

(i) the LRBA is on terms that are consistent with an arm's length dealing,

or

(ii) the LRBA is brought to an end, and the payments of principal and interest made are made under LRBA terms consistent with an arm's length dealing.

17. Furthermore, SMSF trustees who satisfy these conditions, and apply this Guideline in good faith to revise the terms of their existing LRBAs before 31 January 2017, can be assured that the terms of their LRBA will not be subject to any further compliance action by the ATO for the 2014-15 years and prior.

18. The following examples illustrate how the Safe Harbours apply in conjunction with the opportunity for SMSF trustees to review and revise the terms of their LRBAs before 31 January 2017.

Example 1 – real property

19. A complying SMSF borrowed money under an LRBA on terms consistent with section 67A of the SISA. It used the funds to to acquire commercial property valued at $500,000 on 1 July 2011.

- The borrower is the SMSF trustee.
- The lender is an SMSF member's father (a related party).
- A holding trust has been established, and the holding trust trustee is the legal owner of the property until the borrowing is repaid.

20. The loan has the following features:

- the total amount borrowed is $500,000
- the SMSF met all the costs associated with purchasing the property from existing fund assets
- the loan is interest free
- the principal is repayable at the end of the term of the loan, but may be repaid earlier if the SMSF chooses to do so
- the term of the loan is 25 years

- the lender’s recourse against the SMSF is limited to the rights relating to the property held in the holding trust, and
- the loan agreement is in writing.

21. We do not consider that this LRBA has been established or maintained on arm’s length terms. The income earned from the property, which is rented to an unrelated party, may give rise to NALI.

22. At 1 July 2015, the property was valued at $643,000.

23. The SMSF has not repaid any of the principal since the loan commenced.

24. If after considering TD 2016/16, it is determined that the income earned from the property is in fact NALI, to avoid having to report NALI for the for the current year (and prior years) the Fund has a number of options.

Option 1 – Alter the terms of the loan to meet guidelines

25. The SMSF and the lender could alter the terms of the loan arrangement to meet Safe Harbour 1, for real property (see paragraph 6 of this Guideline).

26. To bring the terms of the loan into line with Safe Harbour 1, the trustees of the SMSF must ensure that:

- The 70% LVR is met (in this case, the value of the property at 1 July 2015 may be used). Based on a property valuation of $643,000 at 1 July 2015, the maximum the SMSF can borrow is $450,100. The SMSF needs to ensure that required payments of principal and interest are actually made and brought up to date by 31 January 2017.
- The loan term cannot exceed 11 years from 1 July 2015. The SMSF must recognise that the loan commenced 4 years earlier. An additional 11 years would not exceed the maximum 15 year term.
- The SMSF can use a variable interest rate. Alternatively, it can alter the terms of the loan to use a fixed rate of interest for a period that ensures the total period for which the rate of interest is fixed does not exceed 5 years. The loan must convert to a variable interest rate loan at the end of the nominated period.
- The interest rate of 5.75% p.a. applies from 1 July 2015 to 30 June 2016. Calculation of interest payable for the purposes of making required payments of principal and interest must take into account the opening balance of $500,000, the remaining term of 11 years, and the timing of the capital repayment, into account.
- The new LRBA must continue under terms complying with the ATO’s guidelines relating to real property at all times. For example, the SMSF must ensure that it updates the interest rate used for the loan on 1 July each year (if variable) or as appropriate (if fixed), and make monthly principal and interest repayments accordingly.

Option 2 – Refinance through a commercial lender

27. The fund could refinance the LRBA with a commercial lender, extinguish the original arrangement and pay the associated costs.

28. For any period after 1 July 2015 that the original loan remains in place, the SMSF must ensure that the terms of the loan are consistent with an arm’s length dealing, and relevant amounts of principal and interest are paid to the original lender.

29. The SMSF may choose to apply the terms set out under Safe Harbour 1 to calculate the amounts of principal and interest to be paid to the original lender for the relevant period.

Option 3 – Pay out the LRBA

30. The SMSF may decide to repay the loan to the related party, and bring the LRBA to an end before 31 January 2017.

31. For any period after 1 July 2015 that the original loan remains in place, the SMSF must ensure that the terms of the loan are consistent with an arm's length dealing, and the relevant amounts of principal and interest are paid to the original lender.

32. The SMSF may choose to apply the terms set out under Safe Harbour 1 to calculate the amounts of principal and interest to be paid to the original lender for the relevant period.

Example 2 – collection of listed shares

33. A complying SMSF borrowed money under an LRBA on terms consistent with section 67A of the SISA. It used the funds to acquire a collection of stock exchange listed shares valued at $100,000 on 1 July 2011.

- The borrower is the SMSF trustee.
- The lender is an SMSF member (a related party).
- A holding trust has been established, and the holding trust trustee is the legal owner of the collection of shares until the borrowing is repaid.

34. The loan has the following features:

- the total amount borrowed is $80,000
- the SMSF met all the costs associated with purchasing the shares, and provided $20,000 from existing fund assets towards the purchase price
- interest was payable, but only at a fixed rate of 2% p.a. for the entire term of the loan
- the principal is repayable at the end of the term of the loan, but may be repaid earlier if the SMSF chooses to do so
- the term of the loan is for 10 years
- the lender's recourse against the SMSF is limited to the rights relating to the collection of shares held in the Holding Trust, and
- the loan agreement is in writing.

35. We do not consider that this LRBA has been established or maintained on arm's length terms. The dividend income earned from these shares may give rise to NALI.

36. As at 1 July 2015, the parcel of shares was valued at $120,000.

37. The SMSF has not repaid any of the principal since the loan commenced.

38. If after considering TD 2016/16, it is determined that the dividend income is in fact NALI, to avoid having to report NALI for the current year (and prior years) the Fund has a number of options.

Option 1 – Alter the terms of the loan to meet guidelines

39. The SMSF and the related party could alter the terms of the loan to comply with Safe Harbour 2, for a collection of stock exchange listed shares (see paragraph 8 of this Guideline).

40. To bring the terms of the loan into line with Safe Harbour 2, the trustees of the SMFS must ensure that:

- The 50% LVR is met (in this case the value of the collection of shares at 1 July 2015 may be used). Based on a market valuation of $120,000 at

1 July 2015, the maximum the SMSF can borrow is $60,000. The SMSF must ensure that required payments of principal and interest are actually made and brought up to date by 31 January 2017.

- The loan term cannot exceed 3 years from 1 July 2015. The SMSF must recognise that the loan commenced four years earlier. An additional three years would not exceed the maximum 7 year term.
- The interest rate must be a variable interest rate, as the loan has already been fixed for 4 years from when it commenced (that is, 1 July 2011).
- The interest rate of 7.75% p.a. applies from 1 July 2015 to 30 June 2016. Calculation of interest payable for the purposes of making required payments of principal and interest must take into account the opening balance of $80,000, the remaining term of three years, the timing of the capital repayment, and the interest already paid.
- The new LRBA must continue under terms complying with the ATO's guidelines relating to listed shares at all times. For example, the SMSF must ensure that it updates the interest rate used for the loan on 1 July each year, and make monthly principal and interest repayments accordingly.

Option 2 – Refinance through a commercial lender

41. The SMSF could refinance the LRBA with a commercial lender, extinguish the original arrangement and pay the associated costs.

42. For any period after 1 July 2015 that the original loan remains in place, the SMSF must ensure that the terms of the loan are consistent with an arm's length dealing, and that principal and interest amounts are paid to the original lender.

43. The SMSF may choose to apply the terms set out in Safe Harbour 2 to calculate the amounts of principal and interest to be paid to the original lender for the relevant period.

Option 3 – Payout the LRBA

44. The SMSF may decide to repay the loan to the related party, and bring the LRBA to an end before 31 January 2017.

45. For any period after 1 July 2015 that the original loan remains in place, the SMSF must ensure that the terms of the loan are consistent with an arm's length dealing, and the relevant amounts of principal and interest for that period are paid to the original lender.

46. The SMSF may choose to apply the terms set out in Safe Harbour 2 to calculate the amounts of principal and interest to be paid to the original lender for the relevant period.

Commissioner of Taxation
28 September 2016

Amendment History

Date	Part	Comment
28 September 2016	More Information	Insertion of reference to TD 2016/6. Deletion of references to ATO ID 2015/27 and ATO ID 2015/28.
	Background and Additional	Changes made to reflect publication of TD

	Information	2016/6 as replacement for withdrawn ATO ID 2015/28 and ATOID 2015/29.
	ATO's compliance approach for LRBAs established before 30 June 2016	References to "30 June 2016" changed to "31 January 2017".
	Example 1 – real property	Changes made to reflect publication of TD 2016/6 as replacement for withdrawn ATO ID 2015/28 and ATOID 2015/29.
	Option 1 – Alter the terms of the loan to meet guidelines	Changes made to reflect change of date for review and revision of terms of LRBAs from 30 June 2016 to 31 January 2017.
	Option 2 – Refinance through a commercial lender	Changes made to reflect change of date for review and revision of terms of LRBAs from 30 June 2016 to 31 January 2017.
	Option 3 – Pay out the LRBA	Changes made to reflect change of date for review and revision of terms of LRBAs from 30 June 2016 to 31 January 2017.
	Example 2 – collection of listed shares	Changes made to reflect publication of TD 2016/6 as replacement for withdrawn ATO ID 2015/28 and ATOID 2015/29.
	Option 1 – Alter the terms of the loan to meet guidelines	Changes made to reflect change of date for review and revision of terms of LRBAs from 30 June 2016 to 31 January 2017.
	Option 2 – Refinance through a commercial lender	Changes made to reflect change of date for review and revision of terms of LRBAs from 30 June 2016 to 31 January 2017.
	Option 3 – Pay out the LRBA	Changes made to reflect change of date for review and revision of terms of LRBAs from 30 June 2016 to 31 January 2017.
	References	Updated

References

ATOlaw topic(s)	Superannuation ~~ Superannuation Industry (Supervision) Act 1993 ~~ SMSF investment ~~ Limited recourse borrowing
Legislative references	ITAA 1997 ITAA 1997 295-550 ITAA 1997 295-550(1) SISA 1993 SISA 1993 67A SISA 1993 67(4A) SISA 1993 67B
Related Rulings/Determinations	SMSFR 2012/1 Taxation Determination TD 2016/16
Other references	ATO ID 2015/27 (withdrawn) ATO ID 2015/28 (withdrawn) SPR 2014/1